

Captives and Liability



New exposures in health care are driving increased interest in captives.

The flexibility of captives is well-suited to serve the rapidly changing risks health care organizations face.

By Alex Wright

The U.S. health care system is fraught with risks. From traditional risks such as medical malpractice, professional liability and workers' compensation to the emerging threat of cyber and new technologies like telehealth and telemedicine, the next big lawsuit may be lurking just around the corner.

Last year's spate of WannaCry attacks shut down entire hospital and health care systems across the world, with hackers demanding millions in ransom payments to unlock files.

Meanwhile, health care organizations and hospitals are continuing to grapple with health care reform, with 30 million more people entering the system under the Affordable Care Act.

Add to that the shift from

fee-for-service to outcome-based compensation and an aging population.

"There's no way you can actively predict risk in the health care sector, because it keeps changing so rapidly," said Bridget Zaremba, AVP, health care claims lead, QBE North America.

"The big increase in M&A activity has resulted in a much larger risk pool that runs to cyber liability and class action lawsuits around biometrics and experimental procedures, antitrust claims and the emergence of alternative care methods, such as telemedicine."

As health care risks continue to rise, so do the costs involved. U.S. health care spending topped \$3.3 trillion in 2016, making it one of the country's largest industries by value at 18 percent of gross domestic product.

Given the range and complexity of these new risks, captives can be a viable solution, enabling organizations to tailor their own specific coverage. By pooling together, health care providers can also spread the risk between themselves and leverage the data and analytics available to them.

Leading the way on this front is Vermont, with 100 health care captives on its books, a testament to its risk transfer expertise and regulatory infrastructure and reputation. That number is only expected to grow given the multitude of risks facing the health care industry.

BATCH CLAIM CONCERNS

While medical professional liability, general liability and workers' compensation remain the most common lines written in a health care captive, according to Aon's latest captive benchmarking report, a host of new risks have emerged.

One of the biggest is batch claims, where one incident or a group of related incidents such as a rogue nurse or an infected surgical tool can result in multiple lawsuits.

The number of reported claims is on the rise annually, according to Aon/ASHRM's 2017 Hospital and Physician Professional Liability Benchmark Analysis. Driven by plaintiff counsels seeking to maximize recovery, they are hard to contain and can often result in multimillion dollar claims.

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"If they can find a case and sign up multiple claimants, they will pursue it relentlessly."

Kevin Gabhart, senior managing director, Beecher Carlson, said finding the appropriate coverage for batch claims in the commercial market can be difficult at the best of times. That's because of the almost limitless outcomes possible, he said.

"Finding the right language and wording for batch claims that's agreeable to both the insured and the underwriter can be problematic," Gabhart said. "That's because there's no silver bullet for every potential scenario that may arise."

In recent times, hospitals and health care systems have also become a prime target for hackers, who are increasingly sophisticated in their methods for gaining access to electronic medical records, including the use of ransomware.

Put in context, the average cost of a health care data breach topped \$7.35 million in 2017, according to a report by the Ponemon Institute, sponsored by IBM Security.

The cyber threat has been exacerbated by the use of third parties, as well as handheld electronic devices in hospitals and health care systems, the large amount of patient and employee data held on the system, and multiple access points. Then there is the crossover between cyber and product liability in the form of defective medical devices.

"We have had clients who were hacked and their whole system was in lockdown," said Jason Flaxbeard,

executive managing director, Beecher Carlson.

"As a result, they lost access to records and had to turn patients away, and the hackers demanded a ransom to release the files, which although costly is not as burdensome as losing all of your data."

REMOTE CARE

Another emerging risk is telemedicine, with the use of video consultations expected to increase 700 percent by 2020, according to industry experts. Fueled by advancements in technology, health care providers are increasingly turning to video conferencing, digital photography and instant messaging to reach patients in even the remotest of places.

Its growth has been boosted by regulations such as the Medicare Telehealth Parity Act of 2015, which expanded telehealth coverage to Medicare beneficiaries and has streamlined the payment system.

While it can save time and money, as well as enable patients to do simple tasks such as give their heart rate and blood pressure reading at the click of a button, it's not without risk.

The main liabilities include standard of care and data breach as well as incorrect diagnosis, prescription or treatment. Fraud and abuse are also concerns, not to mention a host of legal and regulatory issues including cross-border licensure and credentialing.

"Billions are being invested in new digital telehealth technology, and health care executives are

SUMMARY

- **U.S. health care** spending exceeded \$3 trillion in 2016 alone.
- **Cyber threats** and batch claims have become key concerns.
- **Captives** are now being used for high-severity, low-frequency health care risks.

embracing it,” said Kevin Poole, client services director, Artex Risk Solutions.

“The key to success is patient acceptance. However, liability issues such as jurisdiction, standard of care by venue, statute of limitations, credentialing of telemedicine providers, equipment malfunction and lack of informed consent remain.”

CAPTIVE USE

Captives have emerged as a viable solution to these emerging risks. The main reason for this, said Bill Boone, senior VP, alternative solutions within Marsh’s National Health Care Practice, is their flexibility.

“Traditionally, captives have been used to fund risks, like professional liability and workers’ compensation, for big health care providers. But now they are being used to cover high-severity, low-frequency risks

such as cyber, D&O, E&O and anti-trust as well,” he said.

“They also provide direct access to the worldwide reinsurance market where rates are often more competitive than the traditional insurance market.”

Heather McClure, chief risk officer, OU Medicine, and executive director, OU-OUMI Risk Management, said health care captives are increasingly being used to cover lines typically written by commercial carriers. This also extends to benefits and workers’ compensation to better control loss and premiums, she said.

“In my own system, we recently added coverage for the teaching hospitals to our physicians’ captive,” she said. “This allows for centralized risk and claims management, efficiencies for patients and the promotion of safety improvements

with one unified vision.”

Patti Pallito, director, Aon Insurance Managers, Vermont, added that given the increase in M&A activity, captives are being used to cover the legacy risk of newly acquired businesses. Risk retention groups are also being employed to standardize the terms and conditions of liability coverage for those entities, she said.

“A captive is a very effective mechanism to monitor and manage legacy risk,” Pallito said. “Meanwhile, risk retention groups can give the health care organizations better control of the oversight and defense of claims.” &

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